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In the Supreme Court of the United States

October Term, 1982

ROBERT D. STIGLER,
Petitioner,

vs.

STATE OF MISSISSIPPI,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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QUESTIONS PRESENTED

Question 1: Whether the Fifth, Sixth, and Fourteenth Amendments require suppression of a post-arrest inculpatory statement which was obtained after the petitioner had invoked his right to consult counsel and to remain silent and immediately following a statement by an arresting officer that "any assistance given by him would be noted to the district attorney and judge."

Question 2: Whether, under the Fourth Amendment, a valid search warrant may be issued on the premise that a confidential informant was "known" by the prosecuting attorney.

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The petitioner, Robert D. Stigler, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Mississippi entered in this proceeding on May 19, 1982, Petition for Rehearing denied on June 30, 1982.

OPINION BELOW

The opinion and judgment of the court below was rendered *per curiam* and is reported 415 So. 2d 686.

PARTIES TO THIS PETITION

All parties to the proceeding in this court are listed in the caption of the case.

JURISDICTION

The judgment of the Supreme Court of Mississippi was entered on May 19, 1982. A timely petition for rehearing *en banc* was denied on June 30, 1982, and this petition for certiorari was filed within sixty (60) days of that date. The jurisdiction of this court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution of the United States, Amendment IV provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Constitution of the United States, Amendment V provides in pertinent part:

> "No person . . . shall be compelled in any criminal case to be a witness against himself. . ."

The Constitution of the United States, Amendment VI provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence."

The Constitution of the United States, Amendment XIV provides in pertinent part:

> "No state shall make or enforce any law which shall abridge the privlieges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This petition presents significant federal constitutional issues concerning the permissible scope of a custodial interrogation of the accused and the validity of a search warrant. The Mississippi Supreme Court decided both federal questions in a way which clearly conflicts with applicable decisions of this court.

At approximately 11:00 o'clock a.m. on February 11, 1981, Ricky Banks, the sheriff of Leflore County, Mississippi; Dennis McAnally, an agent of the Mississippi Bureau of Narcotics; and Charles Swayzee, the county attorney for Leflore County, Mississippi, appeared before a Justice Court Judge seeking the issuance of a warrant authorizing the search of the petitioner's residence for contraband thought to be thereon consisting of a quantity of marijuana.

The affidavit requesting the issuance of the search warrant, together with the appended sheet setting forth the alleged underlying facts and circumstances upon which the officers relied to supply probable cause for issuance of the warrant, was prepared by Mr. Swayzee, the county attorney, on the basis of information related to him by Sheriff Banks and Agent McAnally.

After the affidavit was prepared by the county attorney, it was presented to the magistrate by the county at-

torney, the sheriff, and the narcotics agent. The testimony of the officers was taken by the judge and the affidavit was signed by them in the presence of the judge. The only testimony offered in connection with the issuance of the warrant consisted solely of the officers reading to the judge the affidavit for the search warrant together with the underlying facts and circumstances. The only persons present before the judge were the two officers and the county attorney.

Based upon the affidavit and the description of the underlying facts and circumstances, the judge issued the search warrant under the authority of which the petitioner's property was entered by the officers and a search was conducted which yielded the contraband which formed the basis of the subsequent indictment and conviction of the petitioner.

The affidavit for the search warrant, after the formal charging parts, incorporated a sheet labeled "underlying facts and circumstances". The underlying facts and circumstances alleged by Banks and McAnally were:

> "We, the undersigned, affiants, Ricky Banks and Dennis McAnally, being first duly sworn according to law, do hereby depose and state as follows:
>
> "On the morning of February 11, 1981, a confidential informant, who the undersigned believe to be reliable and trustworthy based on the information he provided to us on this date (and) because some of such information is corroborated by other independent sources, who have also provided us reliable information in the past which proved to be correct, that Robert D. Stigler had approximately five hundred pounds of Marijuana in his possession on Monday, February 2, 1981. The confidential informant observed this Marijuana at

Robert D. Stigler's residence as described in the attached search warrant. The confidential informant has observed Marijuana in the past on more than one occasion and is familiar with Marijuana for identification purposes. Within the last twenty-four hours Robert D. Stigler advised the confidential informant that he still had possession of this Marijuana at the same address as described in the attached search warrant . The confidential informant stated that the Marijuana is packaged in approximately twenty pound brick packages.

"This confidential informant has personally been known by the Assistant District Attorney of the Fourth Judicial District of Mississippi for the past 10 years and in his opinion the confidential informant is reliable and trustworthy and has proved to be reliable and trustworthy in his dealings with the assistant District Attorney over the past ten years.

"Based on the above information we respectfully request that a search warrant be issued authorizing and directing the search of the residence of Robert D. Stigler as described on the attached affidavit.

"s/ Dennis K. McAnally
AFFIANT

"s/ Ricky Banks
AFFIANT"

Based solely on the testimony described above, a search warrant was issued authorizing the search of the petitioner's residence. The sheriff and other officers then went to the residence where they forced open a door and conducted the search which resulted in the discovery of a substantial quantity of marijuana.

The petitioner returned to his residence late the same evening. He discovered the forced entry and the search warrant. Thereafter, he voluntarily reported to the sheriff's office in Leflore County, Mississippi, and was arrested and charged with the possession of more than one kilogram of marijuana in violation of the provisions of *Mississippi Code Annotated*, §41-29-139(d)(2)(D) (1972).

Richard Oakes, an agent with the Mississippi Bureau of Narcotics, testified that he participated in the search of the petitioner's residence and also testified that at approximately 11:30 o'clock p.m. on the same day he was notified that the petitioner was at the sheriff's office and that he went there to begin "the processing" which consisted in part of advising the petitioner of what is commonly referred to as the "Miranda warnings". After having been so advised, the petitioner executed a Miranda warning form and invoked his right to remain silent and to obtain the assistance of counsel to represent him.

After the Miranda warnings were given and the form was executed, Oakes asked the petitioner if he wished to make a statement. The petitioner informed him that he did not want to make a statement and that fact was noted on the Miranda form. The petitioner further stated that he would like to confer with his attorney. However, Oakes then stated to the petitioner that if he wished to provide the names of persons that he might know that were involved in the distribution of drugs or to provide any other information or assistance that he might be able to provide the Bureau in making any cases against any other individuals, that his assistance would be duly noted to the district attorney and to the judge. Immediately following this offer, the petitioner was alleged to have made the following statement while in custody:

"I shouldn't have had the stuff in the house."

This statement was allegedly made just after Oakes had advised the petitioner that any assistance given by him would be noted to the district attorney or to the judge.

Subsequently, the petitioner was indicted for the offense of possession of more than one kilogram of marijuana. He was tried and convicted in the Circuit Court of Leflore County, Mississippi, and was sentenced to serve a mandatory term of three years in the Mississippi State Penitentiary without pardon or parole and to pay a fine of Ten Thousand Dollars ($10,000).

During the trial, the petitioner repeatedly objected to the introduction of any evidence seized from his home as a result of the defective search warrant and objected to the introduction of the inculpatory statement made during a period of custodial interrogation. The objections were overruled. The petitioner appealed his conviction to the Mississippi Supreme Court which affirmed the judgment of the Circuit Court.

REASONS FOR GRANTING THE WRIT

The petitioner was denied his constitutional right securing the privilege against self-incrimination and his right to have the assistance of counsel.

After he voluntarily surrendered to the sheriff, petitioner was advised of his "Miranda rights". He repeatedly indicated that he did not intend to make any statement and that he wished to confer with his attorney. Nevertheless, while he was being booked or "processed" into the Leflore County Jail, an agent of the Mississippi Bureau of Narcotics told petitioner that if he would provide names of persons who were involved in the distribution of drugs or any other information or assistance in

"making any cases against any other individuals", his assistance would be duly noted to the judge. Immediately thereafter, the petitioner reportedly said to the agent: "I shouldn't have had the stuff in the house". When the statement was made, the petitioner was actually in custody. The nature of the exchange constituted an interrogation.

In *Miranda v. Arizona*, 384 U. S. 436 (1966) this Court held at 444:

> "The prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."

More recently, in *Brewer v. Williams*, 430 U. S. 387 (1977), the Court specifically held that the Sixth and Fourteenth Amendments forbid a deliberate design or scheme on the part of the police to elicit information from the accused while he is isolated from his lawyer. In *Brewer* the Court held that the "Christian burial speech" was tantamount to interrogation initiated after the accused had indicated his desire to remain silent and to confer with his attorney.

In the present case, the petitioner, after having exercised his Miranda rights, was offered an inducement for "making any cases against other individuals". This offer was made and designed to elicit an incriminating response from the accused. The officer admitted he promised that cooperation would be reported to the district attorney and to the court.

This Court recently considered a similar factual situation in *Rhode Island v. Innis*, 446 U. S. 291 (1980) and held at 300 *et seq.*:

> "It is clear therefore that the special procedural safeguards outlined in Miranda are required not where a suspect is simply taken into custody, but rather where a suspect in custody is subjected to interrogation. 'Interrogation,' as conceptualized in the Miranda opinion, must reflect a measure of compulsion above and beyond that inherent in custody itself.
>
> "We conclude that the Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term 'interrogation' under the Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect."

Subsequently, in *Edwards v. Arizona*, 451 U. S. 477, 482 (1982) the Court reaffirmed the *Miranda* holding that: (a) if the accused indicates that he wishes to remain silent, "the interrogation must cease" and (b) if the accused requests counsel, "the interrogation must cease until an attorney is present." Edwards also held that once an accused has expressed his desire to deal with the police only through counsel, he is not subject to further interrogation until counsel has been made available to him *unless the accused himself initiates further communications, exchanges or conversations with the police.*

In *Rhode Island v. Innis, supra* the Court refined the *Miranda* test. First, the suspect must be "in custody", a fact which is not disputed here. Second, the suspect must be subject to "interrogation" after asserting his Miranda rights. If the purported interrogation is not direct or in a customary form it must be "established that a suspect's incriminating response was the product of words or actions on the part of the police that they should have known were reasonably likely to elicit an incriminating response." *Rhode Island v. Innis, supra* at 303.

The petitioner here was in actual custody. He had repeatedly invoked his Miranda rights including the right to remain silent and to confer with his attorney before making any statement. Nevertheless, he was subject to an inducement which was clearly and specifically designed to elicit an incriminating response. He was offered the prospect of prosecutorial and judicial leniency in exchange for cooperation. Immediately thereafter he reportedly made an inculpatory admission which, over objection, was offered into evidence at his trial.

The sufficiency of the affidavit underlying the search warrant in this case is gauged by the ruling of this court in *Aguilar v. Texas*, 378 U. S. 108 (1964) where the Court held at 114 that although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant, *Jones v. United States*, 362 U. S. 257 (1960), the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant whose identity need not be disclosed, see *Rugendorf v. United States*,

376 U. S. 528 (1964), was "credible" or his information "reliable".

In this case, the petitioner concedes that the first test of *Aguilar* - the basis of knowledge test - is met. The petitioner, however, strongly contends that the second requirement of *Aguilar* - the reliability of the informant test - was not met.

The affidavit and "underlying facts and circumstances" were not drafted by a policeman in the midst of an investigation. Compare, *United States v. Ventresca,* 380 U. S. 102 (1965). They were drafted by a trained, experienced prosecuting attorney.

By what appears as almost an afterthought, the prosecuting attorney, as author of the affidavit inserted as part of the testimony of the affiants (Banks and McAnally) the statement that the confidential informant had been known by the prosecuting attorney for ten years and that the informant was reliable and trustworthy in the opinion of the unsworn attorney. It is clear that the hearsay statement of the prosecuting attorney as to his personal belief in the reliability of the confidential informant does not constitute sufficient basis for a finding of probable cause that the affiants themselves had sufficient grounds to conclude that the confidential informant was credible or reliable. Moreover, it is evident that the allegations do not contain any facts whatsoever upon which the Assistant District Attorney based his opinion of reliability. By admitting into evidence the fruits of the search made pursuant to this warrant, the Mississippi Supreme Court clearly decided a federal question in a way which conflicts with the decision of this Court in *Aguilar v. Texas, supra.*

CONCLUSION

For the foregoing reasons, it is respectfully submitted that Writ of Certiorari be granted to review the judgment of the Supreme Court of Mississippi.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, William Liston, attorney for petitioner, Robert D. Stigler, have this date mailed a true and correct copy of the above and foregoing Petition for a Writ of Certiorari to the Supreme Court of the State of Mississippi to the Honorable Amy Whitten, Assistant Attorney General, State of Mississippi, Carol Gartin Building, Jackson, Mississippi.

Certified, this the 27th day of August, 1982.

WILLIAM LISTON